

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

	)	
FIBERTECH NETWORKS, L.L.C.	)	
f/k/a FIBER SYSTEMS, L.L.C.	)	Docket No. 02-47
	)	
v.	)	
	)	
VERIZON NEW ENGLAND, f/k/a	)	
NEW ENGLAND TELEPHONE	)	
AND TELEGRAPH COMPANY	)	
	)	
and	)	
	)	
NORTHEAST UTILITIES	)	
SERVICE COMPANY d/b/a	)	
WESTERN MASSACHUSETTS	)	
ELECTRIC COMPANY	)	
	)	

**ANSWER OF WESTERN  
MASSACHUSETTS ELECTRIC COMPANY**

Pursuant to 220 CMR Section 45.03(4), the Western Massachusetts Electric Company (“WMECO”) files this Answer to the Petition for Interim Relief and Complaint filed with the Department on August 14, 2002, by Fiber Technologies Networks (“Fibertech”). The Department should deny Fibertech’s request for interim relief and dismiss its Complaint.

**I. INTRODUCTION AND SUMMARY**

Fibertech has unlawfully and without authorization attached its fiber optic facilities on hundreds of WMECO’s and Verizon Massachusetts’ (“Verizon”) poles in western

Massachusetts. Fibertech failed to obtain licenses from WMECO or Verizon to attach to their respective poles.

Fibertech's attachments are not only illegal, they create a safety hazard to WMECO's employees and are in violation of the National Electric Safety Code. Fibertech's facilities also put at risk the employees of other companies who attach to the poles as well as the general public. WMECO has notified Fibertech on numerous occasions of these safety violations, but WMECO's concerns have not been addressed by Fibertech. See Exhibits 1-4.

As a result of Fibertech's failure to address WMECO's safety concerns, and to enforce our rights under the License Agreements which WMECO and Fibertech signed, and to prevent Fibertech from making further unlawful and unsafe attachments, WMECO filed suit against Fibertech in the Superior Court of Hampden County. Attached as Exhibit 5 of this Answer is a copy of WMECO's Complaint filed with the court on August 14, 2002, and the affidavits of John S. Tulloch and Gerald F. Molongoski. WMECO sought injunctive relief requiring Fibertech to cease any further unauthorized attachments and to remove the unauthorized attachments that it placed on WMECO's poles. WMECO's Complaint and request for injunctive relief was subsequently joined with a similar Complaint filed in Superior Court by Verizon.

Following oral argument on August 14, 2002, the Superior Court justice entered an order granting the preliminary injunction requests of Verizon and WMECO. See Exhibit 6. The order bars Fibertech from attaching to any poles owned by Verizon or WMECO without express authorization. Id. The order also requires Fibertech to either 1) remove all attachments and associated cable within 45 days from all poles owned by Verizon and WMECO for which it has not received an express license or 2) to deliver to Keefe Clemons,

attorney for Verizon, within 10 days of the order, \$400,000 which is to be disbursed by Mr. Clemons to pay for the corrections of all attachments which are posing safety hazards as deemed by Verizon and WMECO. Id. pages 10-11. The court found that Fibertech was “committing a continuing trespass” and that Verizon and WMECO established a “very strong likelihood of success on the merits.” Id., pages 5-6. The Court also concluded that it “has jurisdiction to provide injunctive relief against common law trespasses under the circumstances presented here.” Id., page 6.

As a result, of WMECO’s complaint and request for injunctive relief filed in Superior Court, Fibertech retaliated by filing a Petition and Complaint with the Department which lacks merit. Fibertech’s Complaint continues to demonstrate that Fibertech is not concerned with any of the safety violations that WMECO has brought to its attention.

Fibertech’s complaint with the Department requests interim relief prohibiting Verizon and WMECO from 1) enforcing their License Agreements which permit them to terminate the agreements for a failure to cure a material breach and annulling termination notices already served on Fibertech, 2) dismantling any portion of Fibertech’s facilities, attaching liens on its facilities or franchises, or drawing on performance bonds, 3) taking any action to force payment of charges for make-ready work relating to Fibertech’s Springfield and Worcester networks, and 4) taking any retaliatory action against Fibertech, including but not limited to canceling the License Agreements, charging multiple annual rental rates, or refusing to process any current or future applications for access to poles or conduit in the Springfield and Worcester areas. The complaint also requests an order requiring WMECO to grant Fibertech access to its facilities and a ruling that the current process for pole attachments is not just and reasonable.

Fibertech's complaint fails to provide facts to support any relief that it is seeking from the Department. Furthermore, the August 19, 2002 order of the Superior Court judge is quite clear that it is the arrogance and "take the law into your own hands" approach of Fibertech which has caused Fibertech to be in the position of having unlawfully installed unsafe fiber optic cable. As a result of the August 19<sup>th</sup> order, Fibertech's request for interim relief is moot and therefore this Department should deny the request.

Fibertech's complaint fails to provide any factual support for the outlandish allegations that it makes. Fibertech makes statements about a "chase your tail conspiracy" and "'go fish' schemes" but provides no facts whatsoever in its complaint in regard to these statements. WMECO responded to all of Fibertech's requests to attach to WMECO poles. In every case, WMECO provided Fibertech with a timely make-ready work estimate. Such make-ready estimates are necessary to ensure that such attachments are in compliance with the National Electric Safety Code. Fibertech ignored WMECO's estimates and attached anyway. At no time did Fibertech raise any concerns with WMECO's make-ready estimates.

As the Superior Court order has determined, Fibertech had no justification for attaching to WMECO poles without a license and that its decision to engage in self-help to remedy what Fibertech perceived was WMECO not acting quickly enough was a serious error in judgment.

## **II. THE DEPARTMENT SHOULD DENY FIBERTECH'S REQUEST FOR INTERIM RELIEF**

### **A. Background Facts**

On or about March 31, 2000, WMECO entered into an Aerial License Agreement with Fibertech's predecessor, Fiber Systems, L.L.C., which established the terms and conditions under which WMECO agreed to allow Fibertech to place and maintain "attachments" on WMECO's poles. See Exhibit 7.

Pursuant to the Agreements, Fibertech was obligated to apply for and have received a license from WMECO and Verizon prior to placing any attachments. See Exhibit 5, Molongoski Affidavit and Exhibit 7.

Before any license would be issued to Fibertech to attach to a particular pole, the parties were required to perform a joint field survey to determine the adequacy of the pole to accommodate the proposed attachments and to determine what, if any, "make-ready work" was required to prepare the pole for the attachment and to provide the basis for estimating the cost of the work. Exhibit 7, Articles I(E) and (F), VIII(A). The "make-ready work" is necessary to ensure that the licensee's attachments will comply with all safety laws and regulations. Fibertech was required to place and maintain all proposed attachments in accordance with the requirements and specifications of the latest editions of the Manual of Construction Procedures ("Blue Book"), WMECO's overhead distribution standards, the National Electrical Code ("NEC"), the National Electrical Safety Code ("NESC") and rules and regulations of the Occupational Safety and Health Act ("OSHA") or any governing authority having jurisdiction over the subject matter. Id., Article V(A). If WMECO determined, as a result of the joint field survey, that a pole to which Fibertech sought to attach was "inadequate or otherwise need[ed] rearrangement of the existing facilities" to accommodate the requested attachments in accordance with the foregoing specifications, WMECO would notify Fibertech of the estimated cost of any make-ready work required to

prepare the pole. Id., Article VIII(C). Further, Fibertech was required to pay for the make-ready work before WMECO would schedule the work within its “normal work load schedule.” Id., at Articles IV(A) and VIII(C) and (H).

The Agreements also obligated Fibertech to construct and maintain, at its own expense, any approved attachments in a safe condition and in a manner acceptable to WMECO, and WMECO reserved the right to make periodic inspections of Fibertech’s attachments at Fibertech’s expense. Id., Articles IX(A) and XI(A).

In addition to obtaining the licenses from WMECO, Fibertech was responsible “for obtaining from the appropriate public and or private authority any required authorization to construct, operate and /or maintain its attachment on public and private property at the location of [WMECO’s and/or the Electric Company’s] poles . . . and shall submit evidence of such authority before making any attachments on such public and/or private property.” See Id., Article VI(A). Similarly, Fibertech was obligated to “comply with . . . all laws, ordinances, and regulations which in any manner affect the rights and obligations of the parties hereto under [the Agreements].” Id., Article VI(C). Most importantly, Article V of the Agreement grants permission for the licensor to remove without prior notice to licensee any condition which “may endanger the safety of licensor’s employees or interfere with the performance of licensor’s service obligations.” Id., Article V(B).

WMECO is entitled to terminate its Agreements with Fibertech and all authorizations granted pursuant thereto if Fibertech “shall fail to comply with any of the terms and conditions of th[e] Agreement[s] or default in any of its obligations under th[e] Agreement[s], or if [Fibertech’s] facilities are maintained or used in violation of any law and [Fibertech] shall fail within thirty (30) days after written notice . . . to correct such default or

noncompliance.” Id., Article XVIII(A). In the event of termination of the Agreements, Fibertech is obligated to remove its attachments from WMECO’s poles within six months of the date of termination. Id., Article XVIII (C). If any of Fibertech’s attachments are found attached to WMECO’s poles without a license, WMECO, “without prejudice to its other rights or remedies under [the Agreements] (including termination) or otherwise, may impose a charge and require [Fibertech] to submit in writing, within fifteen (15) days after receipt of written notification . . . of the unauthorized attachment, a pole attachment application.” If Fibertech fails to submit the requisite application in a timely manner, Fibertech is obligated to “remove its unauthorized attachment within fifteen (15) days of the final date for submitting the required application, or [WMECO] may remove [Fibertech’s] facilities without liability, and the expense of such removal shall be borne by [Fibertech].” Id., Article XII(A). Finally, in the event that an unsafe condition is found and Fibertech is notified of it, WMECO is permitted to remove such unsafe condition. Id., Article V(B).

#### B. Fibertech’s Unauthorized Attachments Are Safety Hazards

In late June 2002, WMECO discovered that Fibertech placed unauthorized attachments on hundreds of poles covered by the License Agreement in the municipalities of Agawam, Easthampton, Springfield and West Springfield. Many of these unauthorized attachments were installed improperly and not in compliance with the specifications set forth in the License Agreement, giving rise to serious and substantial safety hazards for the public and WMECO and Verizon personnel, as well as other pole users, including other telecommunications carriers and cable television providers. See Exhibit 5, Complaint of WMECO and its attached Exhibit C, Attachments 1-3.

Each of the safety violations is described in the Attachments 1-3 of the Affidavits filed in the Complaint in Exhibit 5. The most serious safety concern is that Fibertech violated the NESC distance requirements by installing its cables in certain instances within 40 inches (measured vertically) of electrical wires in the supply space, and within 12 inches of cable in the communications space. This violation causes an immediate threat of serious bodily injury and/or death by creating a significant risk of energizing communications lines either spontaneously induced or upon contact. Id. This is a life-threatening hazard for any technicians working on and around the poles. The most likely victims of this threat are WMECO employees who have to come in close contact with such lines for any emergency service or other repair or maintenance. Id.

In some instances, Fibertech installed standoff brackets to create the appearance of compliance with the 40-inch vertical distance requirement, but because the extension arms extend horizontally they do not create a 40-inch vertical separation as required by code. See Kerwood Affidavit, attached to Verizon's pleadings. Further, Fibertech has "boxed-in" poles by improperly placing attachments on both sides of poles in contravention of construction requirements and clear orders by WMECO to not use such methods. Id. The use of these brackets create an unsafe condition on our poles in that it makes pole replacement more difficult, and prevents safe and easy access by other pole users to their facilities. Id.

Fibertech has also created "mid-span crossovers" by attaching lines that run both above and below the lines of other users, creating further risk of damage to the facilities of other users and increasing the likelihood of causing communications lines to become energized with high voltage electricity from the power lines of the electric company. See Kerwood Affidavit attached to Verizon pleadings. Mid-span crossovers may cause friction



between lines in windy conditions, posing the threat of damage to lines, preventing access to lines by other users, and increasing the risk of electrifying communications lines, which would pose a substantial danger as described above. See Exhibit 5. Moreover, Fibertech installed lines to CATV through-bolts, crushing the cable in some instances, and creating a further barrier for CATV technicians to access the CATV cable. See Exhibit 5 of Verizon's Answer.

Finally, Fibertech placed attachments on old, deteriorated poles that cannot safely accommodate Fibertech's high-tension attachments. Due to their age and deteriorated condition, there is a danger that the poles may collapse, threatening the safety of motorists and passers-by and creating an additional risk of damage to the lines and equipment of the joint owners and other users on those poles.

On July 26, 2002, WMECO notified Fibertech that the attachments were creating a safety hazard to WMECO employees. Exhibit 1. On July 30, 2002, Fibertech responded to WMECO with a request for specific safety hazards. Exhibit 2. On July 30, 2002, the very same day, WMECO presented Fibertech with a list of all known existing safety violations which were photographed and documented the previous two days. Exhibit 3. On July 31, 2002, Mr. Charles Stockdale, General Counsel for Fibertech replied that "all known safety violations have been corrected." Exhibit 4. Fibertech to date has refused to acknowledge the existence of any safety violations. Fibertech is in complete denial as to the gravity of these safety violations. In light of Fibertech's refusal to acknowledge the existence of a problem and refusal to take any action, on August 12, 2002, WMECO filed its suit with the Hampden County Superior Court.

### C. Fibertech's Prayer For Interim Relief Should Be Denied

As discussed above, Fibertech, Verizon, and WMECO have all entered into a License Agreement. At no time during the process has Fibertech objected to any of the terms or conditions proposed in the agreement. Fibertech accepted the proposed terms and signed a legally, binding and enforceable contract. If Fibertech had an objection to the proposed terms, it had the option of not signing the License Agreement and filing a complaint with the Department. The fact that Fibertech has filed a complaint AFTER signing a contract and one day before oral argument in Superior Court indicates that Fibertech's claims are not genuine.

The License Agreements themselves, which Fibertech willingly signed, indicate an acceptance of the process proposed by WMECO and Verizon. There was no dispute as to terms, and no offer by Fibertech to go to the Department over any objectionable terms.

After having signed the contract, WMECO notified Fibertech of all the make-ready work that was required to make the attachments safe. There was no response from Fibertech on a number of the invoices for make-ready work sent by WMECO. In a number of other instances, Fibertech requested to withdraw applications. Fibertech raised no objection to the costs of the work and did not object that said work did not need to be done. So instead of allowing WMECO to perform the make-ready work to ensure that the work was conducting in compliance with the National Electric Safety Code, Fibertech took it upon themselves to attach to WMECO's poles without our consent or authorization. Fibertech merely contends that it had a right to make the attachments in question because of the alleged delays in the process.<sup>1</sup> However, if there was any "delay" it was caused by Fibertech's failure to respond

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<sup>1</sup> Exhibit 6, page 8. The Court notes in its Order that "Fibertech never sought the assistance of the DTE or of a court of law and never asserted in writing to the Plaintiffs any claim of a grant of license by failure to comply with the so-called 45 days rule before resorting to self-help. Nothing in the record before the Court explains why Fibertech could not have taken its dispute to court or to the DTE before resorting to self-help...."

to WMECO's correspondence regarding the make-ready work. Based on the unsubstantiated claim that WMECO and Verizon caused the delays, Fibertech asserts that the Department should grant it interim relief by stopping WMECO from enforcing the License Agreements. Fibertech's arguments on this point are without merit.

The same arguments made in Superior Court are applicable here as well. The Superior Court justice ruled that Fibertech did not have the right to attach to WMECO's poles without a license, regardless of how the delays were caused.<sup>2</sup> The Court ruled that Fibertech's claim was not supported by "any appellate case or any decision of any administrative body in this Commonwealth or in any other state." Exhibit 6, page 3.

Fibertech also notes in its prayer for interim relief that it will suffer irreparable harm if WMECO is forced by Fibertech's irresponsible, unsafe attachments to remove Fibertech's facilities. The Court explicitly addressed this claim of Fibertech by noting that any harm Fibertech would suffer would be as a result of its resorting to self-help.<sup>3</sup>

WMECO is concerned that any request for relief granted to Fibertech in this proceeding would have the effect of voiding the Court's order. WMECO has a signed contract with Fibertech. WMECO sought to have the terms of the contract enforced against

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<sup>2</sup> Exhibit 6, page 5. The Court ruled that "[w]hether the so-called 45 day rule has been violated by the Plaintiffs....need not be resolved for purposes of this preliminary injunction proceeding, because whether the rule was violated or not, Fibertech had no right to place attachments on the plaintiff's poles without permission from the plaintiffs or an appropriate order from a court of competent jurisdiction or the DTE."

<sup>3</sup> Exhibit 6, page 8. The Court found that "Fibertech deliberately resorted to self-help, before instituting proceedings at the DTE and before advising Plaintiffs of its claims to licenses and its intention to make attachments, in order to present Plaintiffs and the DTE or a court of law with a fait accompli; thereby appropriating to itself all the benefits of a license and positioning itself to argue that a removal order would substantially harm Fibertech and subject it to undue and wasteful costs. Having unjustifiably and, in this Court's view, unlawfully created the likelihood of precisely the injunctive relief which it now contends will irreparably harm it and offering no compelling reason why court or DTE approval could not have been sought before erecting the attachments, Fibertech is in no position to argue that any harm it might suffer from preliminary relief outweighs the harm to Plaintiffs which would result from permitting the attachments to remain in place."

Fibertech. The Court found that Fibertech violated the terms of the contract and the Department should not take any action which may limit WMECO's ability to enforce the Court order. Furthermore, if the Department were to grant Fibertech's request for relief, jurisdictional issues would be raised between the Court and the Department. Also, allowing Fibertech the relief it is requesting will send a signal to other potential attachers, that they can simply avoid the terms of a signed contract.

WMECO wants to ensure that Fibertech is required to comply with the terms of its License Agreement and that all of its facilities are in compliance with the National Electric Safety Code. Fibertech has not presented any facts or made any valid arguments which would provide justification for the Department to ignore the Superior Court's order by granting Fibertech interim relief.

D. Fibertech was harmed by its own action of delay and confusion

The primary thrust of FiberTech's petition for interim relief is that WMECO and Verizon introduced unnecessary delays and costs into the process of licensing. The attached documents support WMECO's contentions that Fibertech caused all the delays and unnecessarily complicated this process. The following is a summary of Fibertech's actions that caused delay.

Fibertech filed multiple applications all at the same time and then systematically cancelled almost half of such applications. Some of these cancelled applications are subject to their motion for interim relief. These cancellations were in part in writing and in part orally conveyed to WMECO. The written cancellations will be forwarded to this agency under a separate cover and labeled Exhibit 8.

Fibertech routinely advised WMECO agents that it was negotiating with other entities and exploring the possibility of placing its cable on poles or equipment not owned by WMECO. Fibertech asked WMECO to therefore place many of these applications on hold. Fibertech never prioritized its own request for completion of the field survey work or the submission of make-ready estimates. Fibertech failed to respond in any fashion to the estimates it received for make ready work and failed to otherwise authorize that the work be done. See Exhibit 8, forwarded under separate cover to this agency. Of the applications that still existed, make-ready work estimates were sent to Fibertech. Fibertech paid for and returned only two such documents to WMECO. Fibertech personnel advised WMECO and Verizon that they were considering alternative routes for installation in certain areas and informally requested that they stay the application process until such time as Fibertech concluded that the Verizon/WMECO poles would be necessarily used. In many instances, Fibertech failed to communicate directly to WMECO and improperly expected Verizon to act on its behalf and notify WMECO of the status of events. At no time did Fiber Tech ever raise the timeliness of any of the work to be done by WMECO or otherwise advise WMECO of Fiber Tech's need to move things along.

Additionally, Fiber Tech delayed the process by claiming that the make-ready work was not necessary but failing to give any specifics as to how the estimates should be modified. Fibertech would routinely deny the existence of a problem and continuously requested that work be redone or remeasured despite the fact that it had an agent present when the original field survey work was conducted and failed to object at that time.

Furthermore Fibertech delayed the inevitable in that they failed to recognize the existence of safety conditions and when given written notification of the same, Fibertech

simply responded by saying that the violations no longer existed. After such representation, WMECO re-inspected and determined as late as August 7<sup>th</sup> that all of the serious safety issues still existed and were not modified.

These are merely some of the reasons that Fibertech caused its own delays and these are merely some of the reasons that its petition should be denied.

### **III. WMECO's ANSWER TO FIBERTECH'S COMPLAINT**

Responding to the specific claims set forth in Fibertech's Complaint, WMECO states as follows with respect to each of the numbered paragraphs:

1. This paragraph of the Complaint sets forth a legal conclusion to which further response is unnecessary.

2. WMECO denies the allegations in this paragraph of the Complaint. WMECO denies that it has delayed or denied Fibertech access to poles and conduits in Massachusetts or has attempted to charge Fibertech inflated and inappropriate charges as a condition for Fibertech accessing WMECO's poles, conduits, and rights of way.

3. WMECO denies the allegations in this paragraph of the Complaint. Fibertech has provided no facts to back up its claims that WMECO has acted in an anti-competitive and discriminatory manner. Furthermore, WMECO does not offer telecommunications services.

4. WMECO denies that Fibertech is entitled to interim relief. Fibertech has unlawfully attached to WMECO's facilities in the Springfield metropolitan area. WMECO also denies that it has imposed illegal make-ready charges on Fibertech. WMECO is seeking to enforce the terms of a signed License Agreement in which Fibertech agreed to abide by its terms.

5. WMECO does not have information sufficient to address the claims of Fibertech in this paragraph of the Complaint.

6. WMECO will not address this paragraph of the complaint since it is addressed to Verizon.

7. WMECO admits that it is an electric utility company serving portions of Massachusetts. WMECO's headquarters are located at 174 Brush Hill Avenue, West Springfield, Massachusetts. WMECO's parent company, Northeast Utilities System is located at 107 Selden Street, Berlin, Connecticut.

8. WMECO admits that it is subject to the provisions of M.G.L. c. 166, § 25A and 220 CMR 45.00.

9. WMECO admits that it owns poles and conduits to which Fibertech has sought to attach its fiber cables.

10. This paragraph of the Complaint sets forth legal conclusions and no response is necessary.

11. WMECO admits that Fibertech has requested access to its facilities. WMECO denies that it has delayed such access. WMECO has processed Fibertech's applications in the same manner as it processes other applications.

12. This paragraph sets forth a legal conclusion and no response is necessary.

13. WMECO is without knowledge as to these agreements between Verizon and Fibertech.

14. WMECO admits that Fibertech entered into an Aerial License Agreement with WMECO and Verizon on or about March 31, 2000, and that the copy contained in

Exhibit C of the Complaint is a copy of that agreement. WMECO admits that Fibertech began requesting access to WMECO's poles in 2000.

15. The Department regulations cited in this paragraph speak for themselves and no response is necessary. WMECO has no knowledge as to the testimony provided by Verizon in its Section 271 proceeding.

16. WMECO denies the allegations in this paragraph of the Complaint as they relate to WMECO's conduct.

17. WMECO will not address this paragraph of the complaint since it is addressed to Verizon.

18. WMECO denies the allegations in this paragraph of the Complaint as they relate to WMECO's conduct.

19. WMECO denies the allegations in this paragraph of the Complaint as they relate to WMECO's conduct.

20. WMECO denies the allegations in this paragraph of the Complaint as they relate to WMECO's conduct. WMECO disputes the contention of Fibertech that there is any rule, law, or regulation authorizing Fibertech to install its facilities on WMECO's poles without first obtaining a license.

21. WMECO denies that it fails to conform to all applicable federal and state standards governing the access WMECO provides to its poles and facilities.

22. WMECO denies the allegations in this paragraph of the Complaint.

23. WMECO is without sufficient information to admit or deny the time that Fibertech placed the unauthorized attachments on its poles. Fibertech did not notify WMECO in advance of the dates the attachments would take place. WMECO denies that



any licenses were “deemed granted.” WMECO disputes Fibertech’s contention that Fibertech corrected any National Electric Safety Code violations.

24. WMECO denies the allegations in this paragraph of the Complaint.

25. WMECO is without knowledge as to this alleged conversation between Fibertech and Verizon.

26. WMECO is without knowledge as to this alleged conversation between Fibertech and Verizon.

27. WMECO admits that it was present for a meeting with representatives of Verizon and Fibertech on July 17, 2002. WMECO states that the meeting was adjourned because Fibertech appeared at the meeting with counsel. WMECO and Verizon did not have counsel present, and Fibertech refused to continue the meeting unless its counsel could be present. WMECO is without knowledge as to Verizon’s communications with Fibertech as to safety violations. However, on July 30, 2002, Counsel for WMECO, Mr. Stephen Gibelli, provided Mr. Charles Stockdale with an 8 page list of safety violations. See Exhibit 3. On July 31, 2002, Mr. Stockdale responded that “no violations of the NESC now exist.” See Exhibit 4.

28. WMECO denies that it has threatened to dismantle or otherwise interfere with Fibertech’s facilities. WMECO offered Fibertech the opportunity to address various NESC violations. When Fibertech failed to address the problem, WMECO filed suit in Superior Court. WMECO further denies that the 60-day notice requirement in 220 C.M.R. 45.03(a) is applicable to the facts presented here.

29. WMECO denies the allegations in this paragraph of the Complaint. WMECO denies that it has engaged in any discriminatory or unlawful conduct in its licensing of poles to Fibertech.

30. As set forth in Paragraph 28 of its Answer, WMECO denies that it has threatened to dismantled or interfere with Fibertech's facilities. WMECO has pursued its remedies by enforcing its rights in the Superior Court. WMECO states that Fibertech is the cause of its position because it placed unauthorized attachments on WMECO's poles which are in violation of the National Electric Safety Code and violate the terms of the Parties' License Agreements.

*First Affirmative Defense*

The Complaint fails to state a cause of action upon which relief can be granted.

*Second Affirmative Defense*

WMECO, Verizon, and Fibertech have entered into a License Agreement in which all three parties agreed to the rates, terms, and conditions of the contract. The rates, terms, and conditions in the existing contracts are valid, enforceable, and binding on all the parties. Although, the Department has the authority under M.G.L. c. 166, § 25A to regulate the rates, terms, and conditions of a pole attachment agreement in which the parties cannot agree, the Department does not have the authority to abrogate a contract, such as the License Agreement, which has been entered into good faith by all three parties.

*Third Affirmative Defense*

Fibertech willingly entered into the License Agreements with WMECO and is estopped from recovering such relief because of its actions.

*Fourth Affirmative Defense*

Fibertech lacks clean hands with respect to the allegations in this Complaint, and is therefore not entitled to any relief.

*Fifth Affirmative Defense*

The Department does not have the authority to direct WMECO to issue written licenses nor direct WMECO to recognize the licensure of the Fibertech's facilities on the poles in question.

**WHEREFORE**, for the reasons set forth above, WMECO respectfully requests that the Department deny Fibertech's request for interim relief and dismiss its Complaint.

Respectfully submitted,

Western Massachusetts Electric Company

By its attorneys,

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Dated: August 27, 2002